

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

KEVIN PINE, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

A PLACE FOR MOM, INC., a Delaware
corporation,

Defendant.

Case No. 17-cv-1826

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO COMPEL DEFENDANT TO
PRODUCE RELEVANT DISCOVERY**

Noting Date: August 3, 2018

I. INTRODUCTION

This discovery dispute involves targeted discovery requests seeking data that Defendant A Place for Mom, Inc. ("APFM") maintains in a company database showing the telemarketing calls it placed in violation of the Telephone Consumer Protection Act ("TCPA"). Because such discovery, i.e., a Call List and Call Data, is relevant and discoverable in a TCPA class action, courts have consistently and uniformly ordered production of precisely the information Plaintiff seeks here. *See, e.g.*, Dkt. 90 at 7 (citing numerous cases ordering production of call data in TCPA class actions). APFM does not address or distinguish the cases mandating production. For that reason alone, the motion to compel should be granted.

1 APFM's primary excuse for refusing to produce relevant class discovery that is "standard
2 practice" in actions under the TCPA is that the parties supposedly made an agreement that would
3 relieve APFM from its discovery obligations. No such "agreement" exists. Rather, Plaintiff offered
4 to accept either the Call List and Call Data, or an accurate summary of them. When APFM refused
5 to provide either, Plaintiff moved to compel. APFM's assertion that Plaintiff agreed to forgo key
6 discovery makes no sense. Why would Plaintiff strike any agreement that would relieve APFM
7 from producing discovery relevant to class certification issues?

8 Other than conjuring up a fictional agreement, APFM provides no reasonable basis to
9 excuse itself from its discovery obligations in this matter. The minimal case law APFM cites
10 purportedly in support of its position is easily distinguishable and cuts against the overwhelming
11 weight of authority on this issue. Nor is APFM's burden argument well-taken. APFM admits it
12 has *already* queried the relevant Call List and Call Data and can therefore easily produce it. For
13 these reasons, discussed more fully below, Plaintiff's Motion to Compel (Dkt. 90) should be
14 granted.

15 **II. ADDITIONAL BACKGROUND**

16 APFM attempts to distract the Court from this straightforward discovery issue by making
17 inaccurate statements regarding Plaintiff Pine and proposed class members' claims. *See* Dkt. 91 at
18 2-3. Therefore, Mr. Pine provides this additional background for the Court's benefit.

19 Contrary to APFM's misrepresentations that Mr. Pine "appreciated" APFM's unsolicited
20 telemarketing robocalls, Mr. Pine testified to the opposite in his deposition. Plaintiff provided his
21 phone number to APFM only because APFM promised he could view online senior living quotes
22 – quotes APFM never actually provided. *See* Ex.1 at 180-81. Mr. Pine never expected APFM to
23 call him. *Id.* at 178. He has "been on the Do Not Call list for a long time." *Id.* at 53. APFM's
24 harassing sales calls upset Mr. Pine because they came at a time when he was in an emotional state
25

1 due to the concurrent deaths of his mother and stepmother. *Id.* at 53-54, 179. Mr. Pine felt APFM
2 was trying to take advantage of his emotional state. *Id.* at 44.¹

3 Plaintiff's experience with APFM is consistent with the many other consumers across the
4 country who have lodged complaints about APFM's abusive and deceptive telemarketing practices.
5 Such complaints ultimately caused the State of Washington to enact legislation clamping down on
6 senior care referral services like those offered by APFM—legislation APFM vigorously opposed.
7 *See* Dkt. 90 at 4. Plaintiff's experience with APFM is also consistent with the sworn testimony of
8 Tequoia Urbina – a whistleblower who provided call center support for APFM. *See* Dkt. 90-2. Ms.
9 Urbina confirms that consumers often “complained they did not request to be called” and also
10 complained “about APFM’s excessive calling practices.” *Id.* at ¶¶ 6, 15. Ms. Urbina testified
11 APFM’s autodialer is programmed to call each consumer **fifteen (15) times**. [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 Accordingly, Plaintiff seeks to represent all other aggrieved consumers who, like him,
17 provided their cell phone number to a website owned and operated by APFM and then received
18 incessant telemarketing calls from APFM.

19 **III. ARGUMENT**

20 **A. The Case Law Overwhelmingly Holds That Plaintiff is Entitled to This** 21 **Routine Discovery.**

22 APFM simply fails to address the overwhelming weight of authority in this District and
23 across the country that supports Plaintiff's position. *See, e.g., Gilman et al. v. ER Solutions*, No.
24 C11-0806-JCC, Order, Dkt. 67, at p. 4 (W.D. Wash. Feb. 3, 2012) (attached as Exhibit 1 to Dkt.

25 ¹ While APFM harps—without providing any context—on an email reply Plaintiff sent in response to an
26 APFM *email* (not a call), Plaintiff made clear in his deposition that his email meant “thank you, I’ll be in
27 touch, leave me alone,” *and* was his polite way of telling APFM to stop contacting him. *Id.* at 178-79. After
that communication was sent, Mr. Pine continued to receive unwanted calls and emails from APFM—which
he ignored. *Id.*

1 90) (granting call data discovery in TCPA class action); *Ossola v. Am. Express Co.*, No. 12-cv-
2 4836, 2015 WL 5158712, at *7 (N.D. Ill. Sept. 3, 2015) (“Call data is relevant, and thus produced
3 as standard practice . . . in cases where the defendant is the alleged dialer.”); *O’Shea v. Am. Solar*
4 *Sol., Inc.*, No. 14CV894-L (RBB), 2016 WL 701215, at *2 (S.D. Cal. Feb. 18, 2016) (granting
5 plaintiff’s request for outbound dial list because the “information is relevant to both class
6 certification and to the merits of the case”); *Cahill v. GC Servs. Ltd. P’ship*, No.
7 317CV01308GPCMDD, 2018 WL 1791910, at *4 (S.D. Cal. Apr. 16, 2018) (compelling
8 production of call list); *Gossett v. CMRE Fin. Servs.*, Case No. 15cv803 MMA (NLS), 2015 WL
9 6736883, at *3 (S.D. Cal. Oct. 30, 2015) (granting a motion to compel responses to requests for
10 production of outbound call lists, as such lists were “relevant to the class claims and meritorious
11 claims and defenses in this case”).² Plaintiff’s motion should be granted for this reason alone.

12 The scant case law APFM musters in support of its assertion that production of the Call List
13 and Call Data is not “standard practice” in TCPA litigation is easily distinguishable. For example,
14 APFM cites the court’s order in *Ronquillo-Griffin v. Transunion Rental Screening Sols.*, No. 17-
15

16 ² See also *Martin v. Bureau of Collection Recovery*, No. 10 C 7725, 2011 U.S. Dist. LEXIS 157579 at *8-
17 *12 (N.D. Ill. June 13, 2011) (granting plaintiffs’ requests for a call list); *Donnelly v. NCO Fin. Sys., Inc.*,
18 263 F.R.D. 500, 503-504 (N.D. Ill. 2009) (granting plaintiffs’ request for defendant’s call logs); *Whiteamire*
19 *Clinic, P.A. v. Quill Corp.*, 12-cv-5490, 2013 WL 5348377, at *2 (N.D. Ill. 2013) (granting plaintiff’s request
20 for call list; “the information plaintiff seeks . . . is clearly relevant to class discovery; specifically to the issues
21 of numerosity, commonality, and typicality”); *Stemple v. QC Holdings, Inc.*, 2013 U.S. Dist. LEXIS 99582
22 at *6 (S.D. Cal. June 17, 2013) (“A request for an outbound dial list in a TCPA action is relevant to class
23 certification issues, such as ‘the number and ascertainability of potential class members.’”) (citation
24 omitted); *Gaines v. Law Office of Patenaude & Felix, A.P.C.*, 2014 U.S. Dist. LEXIS 110162 at *5 (S.D.
25 Cal. June 12, 2014) (in a TCPA case, “the outbound dial list is relevant to the issues of numerosity and
26 commonality under Federal Rule of Civil Procedure 23(a), and is therefore discoverable.”); *City Select Auto*
27 *Sales Inc. v. BMW Bank of North America, Inc.*, 867 F.3d 434, 440-41 (3d Cir. 2017) (class-wide call data
relevant to ascertainability); *Legg v. American Eagle Outfitters, Inc.*, 14-cv-61058, Order, Dkt. 69 (S.D. Fla.
Nov. 21, 2014) (ordering production of text message call data in TCPA case because it is “relevant discovery
on whether a class is ascertainable and to class factors such as numerosity, typicality and commonality.”);
Doherty v. Comenity Capital Bank & Comenity Bank, No. 16-cv-1321, 2017 WL 1885677, at *4 (S.D. Cal.
2017) (same); *Haghighyeghi v. Guess?, Inc.*, 168 F. Supp. 3d 1277, 1280 (S.D. Cal. 2016) (“Here, the
information can be used toward discovery of whether the putative class suffered the same alleged injury of
receiving unauthorized text messages from Defendant, and thus would bear on issues of commonality and
typicality.”); *Thrasher v CMRE Fin. Servs., Inc.*, 2015 U.S. Dist. LEXIS 34965 (S.D. Cal. March 13, 2015)
(ordering production of outbound call lists and information pertaining to the defense’s affirmative defense
of prior consent).

1 cv-129, 2018 WL 325051, at *3 (S.D. Cal. Jan. 8, 2018), wherein the court denied the production
2 of various audio recordings. *See* Dkt. 91 at 8. But that case did not even involve the TCPA. Rather,
3 it was a class action alleging the defendant “violated the California Invasion of Privacy Act,” which
4 has nothing to do with this case. *Id.* at *1. Moreover, the discovery at issue – call recordings –
5 similarly has nothing to do with the substance of Plaintiff’s motion to compel. In fact, the court
6 even acknowledged that unlike cases under the CIPA, “outbound dial lists generally are relevant to
7 numerosity and commonality, *and therefore discoverable in TCPA cases.*” *Id.* at * 5 (emphasis
8 added). Accordingly, the court’s order in *Ronquillo* **supports** Plaintiff’s Motion to Compel.

9
10 APFM’s other cited authority is similarly distinguishable. In *Gusman v. Comcast Corp.*,
11 298 F.R.D. 592, 599 (S.D. Cal. 2014), the court held it was inappropriate to require the defendant
12 to produce an outbound dial list only because the consumer had failed to clearly define the class
13 definition and was seeking information relating to marketing calls when it was clear the plaintiff
14 had received debt collection calls. No such circumstances are present here. In *Knutson v. Schwan's*
15 *Home Serv., Inc.*, No. 3:12-CV-0964-GPC-DHB, 2013 WL 3746118, at *8 (S.D. Cal. July 15,
16 2013), the court held the defendant did not need to produce a **second** outbound dial list because the
17 defendant already stipulated to certain class certification requirements and because “a more relevant
18 call list” had already been produced. Here, APFM has not produced any call list nor has it agreed
19 to stipulate that certain class certification requirements have been satisfied. Accordingly, none of
20 the three cases APFM cites actually support its position with respect to production of the Call List
21 and Call Data.

22 Simply put, production of the Call List and Call Data *is* “standard practice” in TCPA
23 litigation because it is relevant to class certification issues. APFM’s argument on this point should
24 therefore be rejected.

25 **B. Plaintiff’s Motion is Timely.**

26 APFM contends that Plaintiff’s Motion is premature because it did not have an opportunity
27 to respond to Plaintiff’s request for the Call Data and Call List. Dkt. 91 at 6. Not so. On July 12,

1 2018, Plaintiff’s counsel wrote to APFM’s counsel “reiterat[ing] his request for production of the
2 Call List and Call Data discovery.” *See* Dkt. 90-2. Because the fact discovery cut-off for class
3 certification is August 6, 2018, Plaintiff requested that APFM confirm it would produce the
4 requested discovery—which was first requested in February—no later than July 13, 2018. *Id.*
5 Plaintiff expressly stated “the parties [would] be at an impasse and Plaintiff will seek court
6 intervention” if APFM failed to respond by the specified deadline. *Id.* APFM refused to confirm
7 it would provide the Call List and Call Data so Plaintiff was forced to seek court intervention. *Id.*
8 To date, APFM *still* refuses to produce the requested discovery, which, as discussed above, is
9 highly relevant to class certification issues. Accordingly, the parties *are* at an impasse and
10 Plaintiff’s motion is ripe for this Court’s consideration.

11 **C. Plaintiff Never Excused APFM From Its Discovery Obligations.**

12 As an alternative ground for refusing to produce routine TCPA class discovery, APFM
13 claims that the parties struck a bargain excusing APFM from producing the requested Call List and
14 Call Data. APFM supports its claim by referring to a June 1 letter from Plaintiff’s counsel. Dkt.
15 91 at 5, 7. APFM, however, ignores the fact that it refused to meet the very limited conditions
16 under which Plaintiff agreed to accept APFM’s written representations with respect to the Call List
17 and Call Data in lieu of providing it.

18 In its June 1 letter to Defendant’s counsel, Plaintiff’s counsel stated that in order for Plaintiff
19 to accept APFM’s written representations, “APFM must confirm that the answer is accurate and
20 responsive to Plaintiff’s discovery requests. In other words, *if APFM cannot confirm the total*
21 *number of persons who received a cell phone call after visiting APFM’s “locate” websites and*
22 *the number of calls such persons received, Plaintiff requires the call data so that his expert can*
23 *determine that number.*” Dkt. 92-1 (emphasis added). APFM refused to meet these conditions.
24 Instead, APFM belatedly served supplemental interrogatory responses along with an unverified
25 letter which (1) inexplicably omitted certain persons from Plaintiff’s proposed class definition and
26

1 (2) failed to disclose the number of calls placed to each cell phone number.³ See Dkt. 90-2.
2 Accordingly, on July 12th, Plaintiff's counsel informed Defendant's counsel that, because APFM
3 had failed to meet its limited conditions, Plaintiff would move to compel unless APFM produced
4 the requested discovery. APFM, however, never agreed to provide the requested discovery and
5 thus Plaintiff was forced to seek court intervention. See Dkt. 90, 90-2. Therefore, no bargain was
6 ever "struck" between the parties prior to the filing of this Motion.

7 After the filing of this Motion, APFM belatedly served supplemental interrogatory
8 responses in an attempt to remedy its deficient discovery responses. But those discovery responses
9 *still* failed to "confirm that the answer is accurate and responsive to Plaintiff's discovery requests"
10 – the limited precondition under which Plaintiff agreed to forego the Call Data and Call List for
11 pre-class certification purposes. *Supra* at 7. Rather, APFM's supplemental interrogatory responses
12 expressly stated they were an "estimate of the number" of class members and that "APFM **cannot**
13 **identify the information Plaintiff requested.**" See Dkt. 92-1, pp. 34 of 76 (emphasis added).
14 APFM made vague and unsubstantiated claims that some of the individuals who submitted
15 webforms on APFM's "locate websites" were false or fake and therefore refused to confirm those
16 individuals were part of Plaintiff's proposed class. *Id.* at pp. 34-41 of 76. In addition, APFM *still*
17 refused to provide the numbers of calls to each of the proposed class members.

18 Because APFM refused to provide accurate and responsive information, Plaintiff's counsel
19 explained to APFM that they required production of the Call List and Call Data so that Plaintiff's
20 expert could conduct his own analysis with the raw data. See Ex. 3 attached hereto.

21 For these reasons, APFM is simply wrong to claim an agreement was struck excusing it
22 from its discovery obligations.
23
24

25 ³ APFM unilaterally chose not to provide information with respect to persons "who had requested
26 information from A Place for Mom directly or through one of its marketing channels or vendors before or
27 after submitting information on the "Locate" websites" even though these individuals fell within Plaintiff's
proposed class definition.

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2 **D. APFM's Burden Argument Is Not Well-Reasoned and Does Not Justify**
3 **Excusing APFM From Responding to Routine Discovery.**

4 APFM's final basis for why it should not be required to produce the Call List and Call Data
5 is that the production of this information would be too burdensome. Dkt. 91 at 9-10. But this
6 argument too makes no sense. APFM concedes in its opposition that it has *already* compiled and
7 analyzed the data at issue both for purposes of providing it to a third-party call vendor and
8 supplementing its interrogatory answers in these proceedings. *See* Dkt. 91 at 5, 10 ("A Place for
9 Mom has already...analyz[ed] such data in order to provide Plaintiff with the information A Place
10 for Mom produced in its supplemental response to Interrogatory Number 8."). Since APFM has
11 already pulled the data together and produced it to a third-party call vendor, all it needs to do is
12 produce that same information to Plaintiff so that his expert too can analyze it for class certification
13 purposes. Therefore, there will be no burden whatsoever on APFM to simply reproduce the data it
14 already queried. To the contrary, Plaintiff's proposal ensures that any burden falls squarely on the
15 shoulders of Plaintiff – who will have his expert process the data accurately and completely.

16 Moreover, even if APFM had made a proper showing that the Call Data and Call List is not
17 reasonably accessible because of undue burden or cost—which it has not—the court may
18 nonetheless order the discovery if the requesting party shows good cause. *Moore v. Lowe's Home*
19 *Centers, LLC*, No. 14-1459 RJB, 2016 WL 687111, at *3 (W.D. Wash. Feb. 19, 2016) (citing Fed.
20 R. Civ. P. 26). Here, good cause exists for the production of the Call Data and Call List.

21 As set forth above, this discovery is highly relevant to class certification issues such as
22 ascertainability, numerosity, and commonality. *See supra* at 4-5 citing cases.

23 In addition, the deposition of APFM's 30(b)(6) corporate representative, Robert
24 Grammatica, further demonstrates the need for Plaintiff's expert to conduct his own analysis with
25 respect to the Call List and Call Data because there is a vast discrepancy between APFM's
26 supplemental interrogatory responses and its corporate representative's testimony with respect to
27 the number of individuals who visited APFM's websites. In its supplemental interrogatory

1 responses, APFM claimed that it received only 97,937 inquiries to its “locate websites” since
2 August of 2013. *See* Dkt. 92-1 at Int. No. 8. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] This approximation is vastly different than the mere 97,000 inquiries
9 APFM claims it received to the “locate websites” over a 4-year period. Because of this
10 discrepancy, Plaintiff’s expert must be given the raw data so that he may make an appropriate
11 determination as to the scope of the class.

12 For these reasons, APFM’s ill-reasoned burden argument does not justify excusing APFM
13 from responding to Plaintiff’s routine TCPA class discovery particularly in view of the discrepancy
14 between its sworn interrogatory responses and corporate representative testimony.

15 **IV. CONCLUSION**

16 For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Motion to
17 Compel and enter an Order requiring APFM to produce the Call List and Call Data within seven
18 (7) days of the entry of such an Order.

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Respectfully submitted,

Dated: August 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Gary M. Klinger
Gary M. Klinger

EXHIBIT A

CONFIDENTIAL - UNDER PROTECTIVE ORDER

In the matter of:

PINE vs. A PLACE FOR MOM, INC.

Jennifer Mellet, 30(b)(6) A Place for Mom

07/24/2018

Reported by: PATSY D. JACOY, CCR 2348

Kramm Job No. 84337



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1 attempts to contact with them because we know that this
2 time in their life can be very stressful, so we want to
3 get in contact with them when the time is right for
4 them.

5 Q. (BY MR. HUTCHINSON) So my question to you is
6 if there's a standard number of calls that A Place for
7 Mom places?

8 A. Well, we -- we hope to connect with them on
9 the first attempt, so some families may only receive
10 one phone call from us while others may receive
11 multiple phone calls from us. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 Q. So is it fair to say that A Place for Mom will
16 place calls to consumers until it contacts them up to a
17 15 number of calls?

18 A. [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 Q. Does A Place for Mom have a script for the
22 calls that it makes?

23 A. It has a guiding script.

24 Q. So yes, it does have a script?

25 A. I mean they don't have to say it word for

EXHIBIT B

In the matter of:

PINE vs. A PLACE FOR MOM, INC.

Robert Grammatica, 30(b)(6) A Place for Mom

07/24/2018

Reported by: PATSY D. JACOY, CCR 2348

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1 Q. What about referrals from experts, doctors,
2 hospitals, is that all lumped within affiliate
3 marketing?

4 A. That's separate and not in my area.

5 Q. So that isn't considered part of the
6 marketing -- marketing-based leads I suppose; is that
7 correct?

8 A. Correct.

9 [REDACTED]
10 [REDACTED]

11 A. Yeah. Again, probably a little more than that
12 combined.

13 Q. And with respect to those two categories,
14 that's all leads that come through the website to A
15 Place for Mom; is that correct?

16 A. It includes calls because there's telephone
17 numbers on the website.

18 Q. Do you know what percentage of people who go
19 through the SEO or SEM channel end up calling A Place
20 for Mom versus submitting a form online?

21 A. [REDACTED]
22 [REDACTED]

23 MR. SNELL: And I don't want to object
24 to every question, but again, we've -- he's prepared to
25 testify about the Locate sites as we said and the

1 objections -- you asked -- have not yet -- you've asked
2 about a lot of stuff that he's not been prepared to
3 testify about. But to the extent you have knowledge,
4 don't speculate, you can answer the questions.

5 Q. (BY MR. SPRAGENS) Do you know how many
6 potential leads, by which I mean inquiries, A Place for
7 Mom receives every year through SEM?

8 A. You're asking me to speculate the total
9 number.

10 Q. You can estimate, if that's easier.

11 MR. SNELL: And only if you can
12 estimate. Don't guess.

13 A. I need a calculator.

14 Q. (BY MR. SPRAGENS) Maybe it would -- maybe it
15 would be easier to work backward. How many total
16 inquiries does A Place for Mom receive every year?

17 A. [REDACTED]
18 [REDACTED]

19 Q. And the percentages we discussed earlier were
20 referred leads, but the same percentages apply in terms
21 of just the hard inquiries?

22 A. [REDACTED]

23 Q. Any differences worth noting?

24 A. Yes, the ones that are SEO are highly
25 qualified because the people know exactly what they're